

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

REC'D TN
REGULATORY AUTH.

January 13, 1999

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OFFICE OF THE
EXECUTIVE SECRETARY

In Re: *Application of the Electric Power Board of Chattanooga for a
Certificate of Convenience and Necessity to Provide Intrastate
Telecommunications Services*

Docket No. 97-07488

**REPORT AND RECOMMENDATION OF HEARING OFFICER ON
JANUARY 12, 1999, STATUS CONFERENCE**

This matter came before the Tennessee Regulatory Authority (the "Authority") on January 12, 1999, for a decision on the Application of the Electric Power Board of Chattanooga ("EPB") for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services (the "Application"). Prior to the deliberations of the Directors on January 12, 1999, at the regularly scheduled Authority Conference, counsel for EPB announced that various circumstances related to the Application and relied upon by EPB in support of the same had changed. After considering the comments of the parties with respect to the announcement made by EPB, the Authority deferred action on the Application

and appointed Chairman Melvin J. Malone to preside over a Status Conference immediately following the Authority Conference.¹ No party objected to the scheduling of the Status Conference.

I. TRAVEL OF THE CASE

On October 21, 1997, EPB filed its original Application of the Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services pursuant to Tenn. Code. Ann. §§ 65-4-201 and 7-52-401 to provide telecommunications services in Hamilton, Bledsoe, Bradley, Marion, Rhea, and Sequatchie Counties in the State of Tennessee. The following parties sought and were granted intervention: American Communications Services, Inc. ("ACSI"); AT&T Communications of the South Central States, Inc. ("AT&T"); BellSouth Telecommunications, Inc. ("BellSouth"); Consumer Advocate Division of the Office of the Attorney General ("CAD"); MCI Telecommunications Corporation ("MCI"); NEXTLINK of Tennessee, L.L.C. ("NEXTLINK"); Tennessee Cable Telecommunications Association ("TCTA"); and, Tennessee Power Company ("TPC").

¹ In an attempt to avoid further delay in this matter, the Directors also voted to revisit this matter at 1:00 p.m. on January 12, 1999, after the conclusion of the Status Conference in order to hear and consider any agreements that might be reached among the parties at the Status Conference. But, after the conclusion of the Status Conference, the Hearing Officer requested that the Directors appear in the Authority's hearing room in public before the parties. When all Directors were before the parties in public, the 1:00 p.m. hearing was canceled.

A hearing on the merits was initially set for December 2, 1997. On November 15, 1997, EPB requested that the December 2, 1997, hearing date be postponed, and the Authority granted the request. A pre-hearing conference was held on December 29, 1997. The parties requested that they be permitted to conduct discovery before filing pre-filed testimony and the pre-hearing officer scheduled the filing of pre-hearing briefs. Thus, the hearing was re-set for April 23, 1998.

The hearing on the merits commenced on April 23, 1998, as scheduled. During the course of the hearing, EPB requested a continuance in order to supplement its Application, and the continuance was granted. A status conference was held on August 5, 1998. EPB filed a Restated Application on September 4, 1998, and a hearing on the merits was held on October 13, 1998.

II. JANUARY 12, 1999, STATUS CONFERENCE

As stated earlier, this matter came before the Authority on January 12, 1999, for a decision on the Application of EPB. Prior to the deliberations of the Directors, counsel for EPB announced that various circumstances related to the Application and relied upon by EPB in support of the same had changed subsequent to the conclusion of the hearing on the merits and thus the closure of the evidentiary

record. After considering the comments of the parties with respect to the announcements made by EPB, the Authority, without objection from the parties, set a Status Conference for January 12, 1999, immediately following the regularly scheduled Authority Conference.

The following parties entered appearances at the January 12, 1999, Status Conference:

William Carriger, Esq., Carlos Smith, Esq., and Mark Smith, Esq., Strang, Fletcher, Carriger, Walker, Hodge & Smith, P.L.L.C., 400 Krystal Building, Chattanooga, Tennessee 37402, for **EPB**;

Jon Hastings, Esq., Boulton, Cummings, Conners & Berry, P.O. Box 198062, Nashville, Tennessee, 37201, for **MCI**;

Henry Walker, Esq., Boulton, Cummings, Conners & Berry, P.O. Box 198062, Nashville, Tennessee, 37201, for **ACSI** and **NEXTLINK**;

Charles B. Welch, Jr., Esq., Farris, Mathews, Gilman, Branan & Hellen, P.L.C., 511 Union Street, Nashville, Tennessee, 37219, for **TCTA**;

Vincent Williams, Esq., Cordell Hull Building, Second Floor, 425 Fifth Ave. North, Nashville, Tennessee, 37243-0500, for the **Consumer Advocate Division of the Office of the Attorney General**.

At the Status Conference, counsel for EPB, Mr. William Carriger, stated that various circumstances surrounding EPB's Application had changed since the October 13, 1998, hearing on the merits. Among other things, Mr. Carriger

represented the following: (1) that Globe Telecommunications, Inc. ("Globe") had canceled its contract with EPB on or about December 31, 1998, or effective December 31, 1998;² (2) that Globe reinstated its contractual relationship with EPB in some form prior to the January 12, 1999, Authority Conference, but communicated to EPB that Globe retained the right to sever the relationship before January 31, 1999, and, in any event would take a "lesser role" than that contemplated under the contract between Globe and EPB that is part of the evidentiary record in this matter; and (3) that a former employee of Globe, Mr. Robert Nyswaner, is currently retained by EPB as a consultant and will become a permanent, full-time employee of EPB in the near future. The aforesaid representations of Mr. Carriger on behalf of EPB are not a part of the evidentiary record in this matter.

Although Mr. Carriger was unable to clearly articulate either the current relationship between Globe and EPB or whether, and if so how, said relationship would affect EPB's Application, EPB did offer to present witnesses later in the day

² Tenn. Code Ann. § 65-4-201(c)(1) requires that an applicant for a Certificate of Public Convenience and Necessity to provide telecommunications services must possess "sufficient managerial, financial and technical abilities to provide the applied for services." In EPB's Restated Application, Globe is referenced in the sections on managerial fitness and technical fitness. Moreover, Mr. Robert Nyswaner of Globe filed pre-filed testimony in this matter and testified at the hearing in support of the Application. The contract between EPB and Globe was also submitted in support of EPB's Application.

Although Mr. Carriger represented on January 12, 1999, that EPB contended in this matter that it met the technical fitness requirement of Tenn Code. Ann § 65-4-201(c)(1) aside from any external contractual arrangements, neither the Application nor the testimony produced at the hearing support his representation.

to testify under oath with respect to the above-cited changed circumstances and in further support of EPB's Application. TCTA, ACSI and NEXTLINK objected to EPB's offer to present witnesses on January 12, 1999, in an effort to place the changed circumstances in the evidentiary record and have the Directors render a decision on the Application on January 12, 1999, or soon thereafter.

It is the reasoned opinion of the Hearing Officer that it would be most imprudent for the Authority to proceed to deliberations upon an evidentiary record with the knowledge of changed circumstances that *may* affect the outcome of the deliberations. Given the announcement of the changed circumstances by EPB, it is incumbent upon the applicant to supplement the record. Still, the manner in which the record is supplemented must be executed with care to ensure due process.

The Hearing Officer notes that the Authority and, to the best of the agency's knowledge, the intervenors did not learn of the changed circumstances announced by Mr. Carriger on January 12, 1999, at the regularly scheduled Authority Conference until the morning of January 12, 1999. Recognizing the same and given the objections of TCTA, ACSI and NEXTLINK, it is the opinion of the Hearing Officer that basic principles of fairness mandate that any additional evidence admitted into the record must be subjected to the opportunity for adequate cross-examination.

After discussions with the parties, the procedural schedule set forth below was agreed upon by the parties, and a hearing date, to the extent necessary, was chosen by the Hearing Officer.

III. RECOMMENDED PROCEDURAL SCHEDULE

The following procedural schedule is submitted to the Directors for consideration:

1. January 19, 1999, noon, EPB files its supplementary testimony.³
2. January 19, 1999, 4:30 p.m., intervenors notify the Authority in writing whether they request a hearing on the supplementary testimony.⁴
3. January 22, 1999, 4:30 p.m., intervenors file rebuttal testimony.
4. January 26, 1999, noon, if no party requests a hearing, the parties would jointly submit an Agreed Order with respect to the supplemental testimony and the rebuttal submitted in response thereto being a part of the evidentiary record in this matter.⁵

³ Notwithstanding the filing date, EPB agreed to provide its supplementary testimony to the intervenors on January 18, 1999.

⁴ EPB stated that it did not wish to have a hearing on the supplemental testimony or the rebuttal testimony.

⁵ The Agreed Order should also address any documents submitted with the supplemental information or rebuttal that is not already a part of the evidentiary record in this matter.


5. If necessary, a hearing date of February 2, 1999, at 2:00 p.m. and continuing to February 3, 1999, 9:00 a.m., if necessary, is recommended.

Respectfully submitted,



CHAIRMAN MELVIN J. MALONE
as Hearing Officer

ATTEST:



Executive Secretary